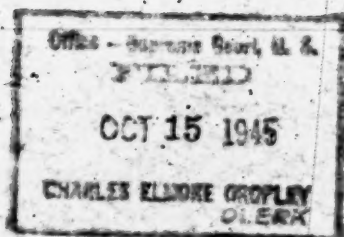


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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1945

**ASHBACKER RADIO CORPORATION, a MICHIGAN COR-
PORATION, PETITIONER**

v.

FEDERAL COMMUNICATIONS COMMISSION

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia (R. 39-40) was entered on January 24, 1945 without an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 24, 1945 (R. 39-40). The petition for a writ of certiorari was filed on April 24, 1945, and was granted on May 28, 1945 (R. 41). The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

When the Federal Communications Commission grants one of two competing applications for the same frequency in the same area and designates the other application for hearing, may the applicant whose application has been designated for hearing appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) of the Communications Act of 1934, as amended?

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended, and the regulations of the Federal Communications Commission are set forth in the Appendix, *infra*, pp. 23-29.

STATEMENT

On March 20, 1944, the Fetzner Broadcasting Company filed with the Federal Communications Commission an application requesting authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kilocycles with 250 watts power, unlimited time. On May 5, 1944, petitioner, the Ashbacher Radio Corporation, filed an application for permission to change the operating frequency of its Station WKBZ, Muskegon, Michigan, from 1490 kilocycles to 1230 kilocycles. The applications were

mutually exclusive because simultaneous operation on 1230 kilocycles at Grand Rapids and at Muskegon would result in intolerable interference to both stations. Upon an examination of the Fetzer application and all data submitted therewith the Commission was able to determine that a grant of the application would be in the public interest. Upon an examination of the petitioner's application and supporting data, the Commission was unable to conclude that the public interest would be served by a grant. Accordingly, pursuant to Section 309 (a) of the Communications Act of 1934, as amended (47 U. S. C. 309 (a), Appendix, *infra*, pp. 23-24), the Commission on June 27, 1944, granted the Fetzer application and designated petitioner's application for hearing.¹ The Ashbacker Radio Corporation then filed a petition for hearing, rehearing, or other relief on July 17, 1944, directed against the grant of the Fetzer construction permit application. The petition was denied by the Commission on September 12, 1944, with an opinion (R. 8-14) setting forth the basis for denial (R. 8-9, 13).

In its opinion denying the petition, the Commission summarized the factual data submitted with the applications involved, which formed the basis for the Commission's action. It pointed out that from an examination of both applications

¹ The hearing, which was originally scheduled for October 3, 1944, was postponed on motion of the applicant, Ashbacker Radio Corporation (R. 14, 19).

and the supporting data, it appeared that a grant of the Fetzer application would result in bringing a new service to 202,800 listeners at nighttime and 238,800 listeners during the daytime, whereas petitioner's application would only increase its listening audience by 3,972 listeners at nighttime and 9,815 listeners during the daytime. Its present daytime audience is 97,525 and its nighttime audience is 77,657. (R. 10.) The opinion also pointed out that a grant of the Fetzer application would not result in interference to any other station but a grant of petitioner's application would involve objectionable interference to about five percent of the primary daytime service of Station WHBY at Appleton, Wisconsin. (R. 11.) The Commission, therefore, denied the petition for rehearing, pointing out that petitioner was not thereby being deprived of an opportunity for hearing. The Commission stated that the grant of Fetzer's application did "not preclude the Commission, at a later date from taking any action which it may find will serve the public interest" and that petitioner would have ample opportunity at the scheduled hearing on its application to show that its operation would better serve the public interest than would the Fetzer grant. If it made such a showing, its application would be granted. (R. 13.) Other objections raised by petitioner to a grant of the Fetzer application were discussed and disposed of in the Commission's opinion. (R. 8-14.)

Upon the denial of its petition for hearing, rehearing, or other relief, petitioner, asserting that it was a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of Section 402 (b) (2) of the Communications Act (47 U. S. C. 402 (b) (2), Appendix, *infra*, p. 26), filed in the United States Court of Appeals for the District of Columbia a notice of appeal from the grant of the Fetzer construction permit application (R. 1-4). The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain the appeal (R. 18-24). This motion was granted without opinion on January 24, 1945 (R. 39-40).

SUMMARY OF ARGUMENT

Petitioner is not entitled to secure judicial review of the Commission's action in granting the application of the Fetzer Broadcasting Company either under Section 402 (b) (1) of the Federal Communications Act, on the ground that its own application has in effect been denied, or under Section 402 (b) (2) on the ground that the Fetzer application was improperly granted.

The Commission has not denied petitioner's application but has set it down for hearing and will not pass finally upon it until that hearing has been held. In effect, petitioner is seeking to appeal from the order setting its application down for hearing. The designation of a matter for hear-

ing is, however, not the type of administrative action which the courts will review prior to a final determination.

Petitioner's broadcasting station operates upon a different wave length from that which has been allotted to the Fetzer Corporation, and petitioner does not base its appeal upon possible competitive injury. Accordingly, *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission v. National Broadcasting Company (KOA)*, 319 U. S. 239, have no application. Petitioner's complaint is that grant of the Fetzer application has impaired its opportunity to obtain a grant of its own application. This contention, however, cannot prevail in the face of the Commission's authority under Sections 309 (a) and 319 (a) of the Federal Communications Act to grant an application without a hearing when it can determine from an examination of the application that the public interest will thereby be served.

Petitioner is protected by the provision of Section 312 (b) of the Act that any license or permit, including the permit of the Fetzer Corporation, may be modified and by the Commission's reservation in its opinion upon rehearing in the Fetzer proceeding of authority to take any subsequent action with regard to that permit which it might find to be in the public interest. If petitioner at the hearing upon its application fails

to make out a case, it is not aggrieved by grant of the Fetzer application; if, on the other hand, petitioner shows that the public interest will be served by granting its application, the application will be granted and the Fetzer permit may be modified or recalled. Petitioner, moreover, may at that stage appeal from a denial of its application, if the Commission should fail to grant it.

Moreover, even if petitioner's interest were less fully protected than it is, it would not have a right of appeal at this stage. Its interest consists at most of a claim which it has staked out for itself in the public domain, to which no substance is given by any provision of law. Petitioner is not entitled to preservation of the status quo pending a hearing upon its application. On the contrary the provision of the Act that applications may be granted without a hearing necessarily includes applications which competed with petitioner's. The courts may not accord to competing applicants a right to simultaneous adjudication which the statute does not give.

The Commission has been granted discretionary power to determine "subordinate questions of procedure", including the order in which applications shall be heard. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138. As a practical matter it is necessary that the Commission be able to exercise these powers in relation to mutually exclusive applica-

tions for broadcasting privileges. The broadcasting industry is dynamic, and the public interest requires flexible procedures within the framework of the Communications Act.

ARGUMENT

Petitioner seeks review on two grounds (Br. 6): first, that the Commission's action in granting the Fetzer application and setting petitioner's application for hearing amounts to a denial of its application, and that therefore it is entitled to appeal under the provisions of Section 402 (b) (1) of the Communications Act; and second, that it is a person aggrieved ^{or} whose interests are adversely affected by the grant of the Fetzer application, entitled to appeal under the provisions of Section 402 (b) (2). Both of these contentions are without merit.

I

PETITIONER'S APPLICATION HAS NOT BEEN DENIED. PETITIONER THEREFORE LACKS STANDING TO APPEAL UNDER SECTION 402 (b) (1) OF THE COMMUNICATIONS ACT

Petitioner's argument that the grant to Fetzer is in fact a denial of its own application is unsound. The Commission has not denied petitioner's application, but has set it down for hearing. Upon the basis of that hearing the Commission will determine whether the application should be granted or denied. Until that determination is made, the application has not been denied. The

right to appeal under Section 402 (b) (1) (*infra*, p. 26) is therefore not available to petitioner.

In fact, what petitioner is complaining of, in addition to the Commission's action in granting the Fetzner application, is its failure to grant without hearing petitioner's own application and its setting that application down for hearing to determine after a fuller development of the facts whether the public interest would be served by granting it.

The designation of a matter for hearing is, however, not the type of administrative action which the courts will review prior to a final determination after the hearing. *Federal Power Commission v. Edison Co.*, 304 U. S. 375; *United States v. Illinois Central R. R. Co.*, 244 U. S. 82; cf. *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 130-131. Petitioner's fears that the Commission may ultimately refuse its application cannot serve as a substitute for final Commission action disposing of the application after the hearing which has been set. *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 208-209; *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 575-576; *Myers v. Bethlehem Corp.*, 303 U. S. 41. Indeed, the Commission has made no statement and has taken no action which forecloses the result of the hearing. And the Commission has expressly stated in its decision on

petitioner's request for rehearing that its application may be granted after hearing if the requisite showing is made that the public interest will be served (R. 13). There is therefore no basis for permitting petitioner to resort to the courts with respect to that application prior to the completion of the hearing.

It is demonstrated in the discussion of petitioner's right to appeal under Section 402 (b) (2) (*infra*, p. 26) that the Commission's action in granting the Fetzer application does not result in present injury to petitioner and does not foreclose petitioner from succeeding upon the hearing that has been scheduled. In any event, even if petitioner is a "person aggrieved" by the Fetzer grant, entitled to appeal from that grant under Section 402 (b) (2), it is at least clear that the Commission has taken no action which amounts to a refusal of petitioner's application within the meaning of Section 402 (b) (1). On the one hand, before petitioner can secure a license it must make the requisite showing that the public interest will be served; on the other hand, the Commission's action upon petitioner's application must await the hearing upon it. Until a determination is made by the Commission after that hearing, a resort to the courts under the provisions of Section 402 (b) (1) is premature.

PETITIONER IS NOT AGGRIEVED NOR ARE ITS INTERESTS ADVERSELY AFFECTED BY THE ACTION OF THE COMMISSION IN GRANTING THE FETZER APPLICATION WITHOUT A HEARING, SO AS TO ENTITLE IT TO APPEAL

Petitioner does not urge in support of its asserted right to appeal under Section 402 (b) (2) (*infra*, p. 26) as a person aggrieved or one whose interests are adversely affected by the action of the Commission in granting a construction permit to Fetzer, that there will be electrical interference with the operation of petitioner's station on its present frequency. No such interference would arise since the two stations would operate on widely separated frequencies. Nor does petitioner base its standing to appeal upon any possible competitive injury resulting to its station in Muskegon, Michigan, from the proposed operation of the Fetzer station in Grand Rapids, Michigan. Accordingly, the cases of *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission v. National Broadcasting Company (KOA)*, 319 U. S. 239, cited by appellant (Br. 9), have no application here. Petitioner's only complaint is that grant of the Fetzer application has in some manner injured petitioner by impairing its opportunity to obtain a grant of its own application, rendering the scheduled hearing upon that application largely meaningless. (Br. 8-13.)

Petitioner argues that the Fetzer Corporation already has its authorization, which conflicts with petitioner's proposed operation, and that the Commission cannot set aside this grant irrespective of any showing petitioner may make at its hearing. This argument completely overlooks the procedural provisions of the Communications Act, the limitations upon any grant which the Commission makes, including the grant to Fetzer, and the express condition which is attached to the Fetzer construction permit by the Commission's opinion upon petitioner's application for rehearing. Under Sections 309 (a) and 319 (a) of the Act (*infra*, pp. 23-25), which have been uniformly construed together, cf. *Goss v. Federal Radio Commission*, 67 F. 2d 507 (App. D. C.), the Commission is authorized to grant an application without a hearing when it can determine from the application and the supporting data that the public interest would be served by a grant.² If it cannot make such a determination,

² In view of the express provisions of Section 309 (a) there can be no doubt of the Commission's authority to make such grants without hearing in appropriate cases. This section was formerly section 11 of the Radio Act of 1927, and was brought over verbatim into the Communications Act. The House Managers in charge of H. R. 9971, 69th Cong., which became the Radio Act of 1927, explained the purpose of Section 11 as follows:

"Section 11 authorizes the licensing authority . . . to issue licenses upon examination of the application if it determines that public interest, convenience, or necessity would be served by the granting thereof. It provides, however, that in the event the licensing authority upon examina-

it must designate the application for hearing. Any license or permit which it issues is subject to the limitation, contained in Section 312 (b) (*infra*, p. 24), that it "may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act * * * will be more fully complied with: *Provided* * * * the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

In its opinion upon rehearing, moreover, the Commission reserved the power to take any action with

tion of an application does not reach such decision with respect thereto, it shall then notify the applicant and fix and give notice of a time and place of hearing on the application." (68 Cong. Rec. 2563.)

This authority enables the Commission to dispose expeditiously of thousands of applications for all types of new radio facilities and modifications and renewals of existing grants. During the fiscal year ending June 30, 1944, the Commission received approximately 25,000 applications for radio station facilities and issued approximately 20,000 authorizations. *Tenth Annual Report of the Federal Communications Commission* (1944), pp. 13, 22, 74. Of these 1,689 were for standard broadcast stations and 1,039 for other types of commercial and related broadcasting; but conflicting applications present a problem in certain other fields as well. *Idem*, 58-59 (aviation communication) and 63 (police radio).

regard to the Fetzner permit which it might find to be in the public interest.

In this case the Commission was able to determine from an examination of the Fetzner application that the proposed operation would not result in any interference to an existing station and that the public interest would be served by a grant. Accordingly, it granted the application without a hearing. In the case of petitioner's application it appeared that some objectionable interference would result to Station WHBY at Appleton, Wisconsin. Because of this fact, among others, the Commission was unable to reach a determination that a grant of petitioner's application would serve the public interest and accordingly designated it for hearing pursuant to the provisions of Section 309 (a). Petitioner thereupon filed a petition for rehearing of the Fetzner application pursuant to Section 405 of the Communications Act (*infra*, pp. 26-27). In its petition, petitioner attempted to show that a grant of the Fetzner application was not in the public interest. If the facts recited in the petition for rehearing had in the Commission's judgment raised a serious question whether the grant of the Fetzner application was in the public interest, the Commission would have ordered a rehearing. However, the Commission considered specifically all of the points raised in the petition for rehearing and, with an opinion which found them to be without merit (R. 8-14), denied the petition.

The Commission recognized that since both the Fetzer Corporation and petitioner requested the same facilities, a grant to one, if permitted to stand, would preclude their grant to the other. Accordingly it expressly pointed out in its opinion that the grant of the Fetzer application and the denial of the petition for rehearing did not preclude the Commission at a later date "from taking any action" with respect to the Fetzer construction permit "which it may find will serve the public interest" (R. 13; see also R. 17, 22). Thus, the grant of the Fetzer application is made subject to any action which the Commission may take as a result of the hearing which is to be held on petitioner's application.³ If as a result of that hearing petitioner fails to show that a grant of its application will serve the public interest, then it is in no way aggrieved by the grant of the Fetzer application. If petitioner at the hearing on its application demonstrates that its proposed operation would better serve the public interest than that of the Fetzer Corporation, the Commission would be required to grant petitioner's application and to proceed to modify the Fetzer permit

³ The Commission has consistently taken this position. See *In re: Evangelical Lutheran Synod of Missouri, Ohio, and Other States (KFUO)*, 8 FCC 118 (1940); *In re: Berks Broadcasting Company (WEEU)*, 8 FCC 427 (1941); *In re: The Evening News Association (WWJ)*, 8 FCC 552, 556 (1941); *In re: Merced Broadcasting Company (KYOS)*, 9 FCC 118, 120 (1942).

to accord with it, by specifying a different frequency or otherwise, or to recall the permit by virtue of the reservation contained in the opinion upon rehearing.⁴ If the Commission should fail to grant petitioner's application under these circumstances, petitioner could then file an appeal from the denial of its application under Section 402 (b) (1) and at that time obtain review of any errors involved in the Commission's ruling. Prior to that time an appeal by petitioner is premature.

Moreover, even if petitioner's interest were less fully protected than it is in relation to the grant to the Fetzner Corporation, there would be no right of appeal on its part from the grant. Petitioner's interest lies at most in a claim which it has staked out for itself in the public domain, to which no substance is given by any provision of law. That claim can only receive legal substance at the hands of the Federal Communications Commission in the light of such legally recognized interests as may have come to prevail at the time it is adjudicated. Nothing in the Communications Act or elsewhere suggests that petitioner is entitled, pending a hearing, to a preservation of the status quo at the time its application was filed. On the contrary,

⁴ The hearing or opportunity to show cause, to which the Fetzner Corporation would be entitled under Section 309 (a) or 312 (b) of the Communications Act before its permit might be recalled or modified, could be consolidated with the hearing upon petitioner's application. The Fetzner Corporation was permitted to intervene as a party in the Ashbacker proceeding on October 4, 1944.

the Act expressly provides that applications may be granted without a hearing by the Commission, and this necessarily includes applications which compete with petitioner's. To hold otherwise would be to fly in the face of the statute. The provisions of the Act may not be thus negatived. As the courts may not compel recognition of "rights of priority" in applicants to receive consideration at the hands of the Commission as against later applicants, such as "only Congress could confer" (*Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145), so may they not accord to competing applicants a right to simultaneous adjudication which the statute does not give or reach the same result by indirection through recognition of a right to appeal, claimed solely because one application was preferred in point of time. Petitioner must take its chances according to the situation which exists at the time its claim is passed upon under the Commission's procedures, subject to the provisions contained in the statute whereby previous rights may be modified in recognition of new applications. It has in the meantime had the benefit of careful consideration of its application on two occasions (R. 14-15), in connection with the application of the Fetzner Corporation.

It is of course true that the Commission must proceed to deal with applications according to the Act and within the discretion conferred upon it.

It is also required to frame its procedures according to the needs which it is called upon to serve. Among those needs are reasonable economy and expedition in the procedures employed. The Commission has been granted flexible powers to determine, among other "subordinate questions of procedure", "whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions". (309 U. S. at 138.) It has exercised these powers resourcefully with respect to the procedural problems here involved.⁵

As a practical matter it is necessary that the Commission be able to grant one of several mutually exclusive applications without a hearing, when in its judgment the public interest would be served thereby. In a field as dynamic as radio broadcasting,⁶ many competing applica-

⁵ The development of the Commission's procedure with respect to intervention and petitions for rehearing is treated in the Final Report of the Attorney General's Committee on Administrative Procedure (1941) at pp. 131-132 and in Committee Monograph No. 3, dealing with the Commission, Sen. Doc. 186, 76th Cong., 3d sess., Part 3, at pp. 12-21. See *infra*, footnote 7.

⁶ The procedural requirements in different fields of regulation necessarily vary considerably, and in the same field may vary from time to time. Partly for this reason, the discretion of Federal administrative agencies in respect to third-party participation in proceedings has largely been preserved by statute and has been variously exercised. See Oberst, *Parties to Administrative Proceedings*, 40 Mich. L. Rev. 378 (1942).

tions are constantly being filed. Frequently the Commission is able to determine from examining an application that it is meritorious and from examining a competing application that it is extremely unlikely to prevail, or in some instances that it was filed for the purpose of preventing or delaying the granting of other applications. Under petitioner's contention the Commission would nevertheless be required to hold a hearing in such a situation, with the result that the licensing of new stations would be effectively delayed and that the filing of "strike applications" for purposes of delay would be encouraged.⁷ Under the procedure followed by the Commission, it is

⁷ Prior to its present rule governing intervention in proceedings before the Commission (Rules and Regulations, Sec. 1.102, 47 C. F. R. 1.102), the Commission's rules governing intervention permitted practically anyone asserting any interest to intervene in a case before the Commission. With respect to this practice, which resulted in such serious obstruction to the Commission's activity that it had to be abolished, the monograph of the Attorney General's Committee on Administrative Procedure which dealt with the Commission stated, "the purpose of the intervener's dilatory tactics was, in many cases, to frustrate the licensing and operation of a competing station for as long a period as possible. It was believed that the cost of maintaining proceedings before the Commission and the courts could easily be covered by the continued revenues from sponsors who might be lost if a competing station were in existence." *Administrative Procedure in Government Agencies*, Monograph No. 3, S. Doc. 186, 76th Cong., 3rd Sess., Part 3, pp. 16-17. The same condition would clearly arise again to plague the Commission if the simple device of filing a competing application were permitted to delay Commission action on an obviously meritorious application.

possible for it to proceed expeditiously in meritorious cases and thereby to render maximum service to the industry and to the public with a limited staff. The interests of other applicants are protected to the greatest extent possible, as petitioner's have been, by means of the hearings on their applications, the statutory authority to modify previous grants, and in some instances, as here, the reservation by the Commission of authority to withdraw a competing grant which has been made without hearing.

The difficulties which would be created if the Commission were unable to grant any license application before according a hearing to a competing applicant are emphasized by recent developments in the radio broadcasting field, notably frequency modulation broadcasting (FM) and television. We are advised that approximately 2,000 FM stations will probably be constructed during the next five years. Each will require a construction permit from the Commission. In the case of such cities as New York and Philadelphia the number of applicants already exceeds the number of frequencies available for distribution. If the Commission were required to afford a hearing to each applicant for particular facilities before any grant could be made, however obviously lacking in merit some of the applications might be, substantial delay in the development of the industry, of service to the public, and of the art of broadcasting

would result. It is clear, therefore, that the discretionary power of the Commission with respect to procedure remains of great importance. We submit that it should not be limited by a strained construction of the statute—a construction which we think is clearly negated by the terms of the Communications Act:

Petitioner's statement (Br. 4) that the Commission's action in granting the Fetzner application was based upon facts contained in the application for which there was no evidentiary support is misleading. Not only was petitioner's application considered at the same time (R. 14-15), but both applications were subjected to careful review by the Broadcast Division of the Engineering Department of the Commission and by the Accounting and Legal Departments, to which all applications are subjected before action is taken.⁸ The Commission is not an uninformed body, wholly dependent upon the data which may be supplied to it by applicants. On the contrary, as is well known, it possesses extensive knowledge of conditions in the broadcasting industry. By means of that knowledge and of the services of an expert staff, it is able to exercise an informed initial judgment upon applications. Its methods, therefore, provide assurance of fairness which may not be ignored and which justifies Commis-

⁸ Monograph of the Attorney General's Committee on Administrative Procedure, *supra*, footnote 7, pp. 8-12.

sion action in numerous instances in which the testimonial processes of a hearing are not employed.

Since petitioner suffered no wrong in the grant of the Fetzner application, it has no standing to appeal from that grant.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the court below dismissing petitioner's appeal should be affirmed.

✓ J. HOWARD McGRATH,
Solicitor General.

✓ RALPH F. FUCHS,
Department of Justice.

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OCTOBER 1945.

APPENDIX

Federal Communications Act of 1934, as amended (48 Stat. 1064, 47 U. S. C. 161 et seq.): et seq.):

ALLOCATION OF FACILITIES: TERM OF LICENSES

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under

such rules and regulations as it may prescribe.

* * * *

REVOCATION OF LICENSES

Sec. 312.

* * *

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * *

CONSTRUCTION PERMITS

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the

station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission

that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * *

PROCEEDINGS TO ENFORCE OR SET ASIDE THE
COMMISSION'S ORDERS—APPEAL IN CERTAIN
CASES

SEC. 402. * * *

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * * *

REHEARING BEFORE COMMISSION

SEC. 405. After a decision, order, or requirement has been made by the Commis-

sion in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.

* * * * *

Rules of Practice and Procedure of the Federal Communications Commission (47 C. F. R. Sec. 1.1 et seq.):

§ 1.356 *Forfeiture of construction permits; extensions of time.*—(a) A construction permit shall be automatically forfeited if the station is not ready for operation within the time specified therein or within such further time as the Commission may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the Commission as of the expiration date.

(b) Any application for extension of time within which to construct a station shall be filed at least thirty days prior to the expiration date of such permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases such applications will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than thirty days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

* * * * *

§ 1.402 *Modification.*—(a) *Order to show cause.*—Whenever the Commission shall determine that public interest, convenience, and necessity would be served, or any treaty ratified by the United States will be more fully complied with, by the modification of any radio station construction permit or license either for a limited time, or for the duration of the term thereof, it shall issue an order for such licensee to show cause why such construction permit or license should not be modified.

SUPREME COURT OF THE UNITED STATES.

No. 65.—OCTOBER TERM, 1945.

Ashbacker Radio Corporation,
Petitioner,
vs.
Federal Communications Com-
mission.

On Writ of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia.

[December 3, 1945.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The primary question in this case is whether an applicant for a construction permit under the Federal Communications Act (48 Stat. 1064, 47 U. S. C. § 151) is granted the hearing to which he is entitled by § 309(a) of the Act,¹ where the Commission, having before it two applications which are mutually exclusive, grants one without a hearing and sets the other for hearing.

In March 1944 the Fetzer Broadcasting Company filed with the Commission an application for authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 ke with 250 watts power, unlimited time. In May 1944, before the Fetzer application had been acted upon, petitioner filed an application for authority to change the operating frequency of its station WKBZ of Muskegon, Michigan, from 1490 ke with 250 watts power, unlimited time, to 1230 ke. The Commission, after stating that the simultaneous operation on 1230 ke at Grand Rapids and Muskegon "would result in intolerable interference to both applicants," declared that the two applications were "actually exclusive." The Commission upon an examination of the Fetzer application and supporting data granted it in June 1944 without a hearing. On the same day the Commission designated petitioner's application for hearing. Petitioner thereupon filed a petition for hearing, rehearing and other relief directed against the grant of the Fetzer application. The Commission denied this petition, stating,

¹ Sec. 319 relates to applications for construction permits. But since such applications are in substance applications for station licenses (*Goss v. Federal Radio Commission*, 67 F. 2d 507, 508) the Commission in such cases uniformly follows the procedure prescribed in § 309(a) for station licenses.

"The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzner application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company* (WEEU), Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association* (WWJ), Detroit, Michigan, 8 FCC 552 (1941); In re: *Merced Broadcasting Company* (KYOS), Merced, California, 9 FCC 118, 120 (1942)."

Petitioner filed a notice of appeal from the grant of the Fetzner construction permit in the Court of Appeals for the District of Columbia, asserting that it was a "person aggrieved or whose interests are adversely affected" by the action of the Commission within the meaning of § 402(b)(2) of the Act.² The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain it. This motion was granted without opinion. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Our chief problem is to reconcile two provisions of § 309(a) where the Commission has before it mutually exclusive applications. The first authorizes the Commission "upon examination" of an application for a station license to grant it if the Commission determines that "public interest, convenience, or necessity would be served" by the grant.³ The second provision of § 309(a) says that if, upon examination of such an application, the Commission does not reach such a decision, "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under

² The relevant provisions of § 402(b) read as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

³ Sec. 307(a) provides, "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

such rules and regulations as it may prescribe."⁴ It is thus plain that § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing. We think that is the case here.

The Commission in its notice of hearing on petitioner's application stated that the application "will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing." One of the issues listed was the determination of "the extent of any interference which would result from the simultaneous operation" of petitioner's proposed station and Fetzer's station. Since the Commission itself stated that simultaneous operation of the two stations would result in "intolerable interference" to both, it is apparent that petitioner carries a burden which cannot be met. To place that burden on it is in effect to make its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent.⁵

The Fetzer application was not conditionally granted pending consideration of petitioner's application. Indeed a stay of it pend-

⁴ Sec. 309(a) reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

⁵ The Commission recognizes in its regulations the desirability of hearing such related matters at the same time or in consolidated cases. By § 1.193, 47 Code Fed. Reg. Cum. Supp. it is provided:

"In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for separate hearings (a) on all related matters which involve the same applicant, or arise out of the

4 *Ashbacker Radio Corp. vs. Federal Communications Com'n.*

ing the outcome of this litigation was denied. Of course the Fetzner license, like any other license granted by the Commission, was subject to certain conditions which the Act imposes as a matter of law. We fully recognize that the Commission, as it said, is not precluded "at a later date from taking any action which it may find will serve the public interest." No licensee obtains any vested interest in any frequency.⁶ The Commission for specified reasons may revoke any station license pursuant to the procedure prescribed by § 312(a) and may suspend the license of any operator on the grounds and in the manner specified by § 303(m). It may also modify a station license if in its judgment "such action will promote the public interest, convenience, and necessity, or the provisions of this chapter * * * will be more fully complied with." § 312(b). And licenses for broadcasting stations are limited to three years, the renewals being subject to the same considerations and practice which affect the granting of original applications. § 307(d). But in all those instances the licensee is given an opportunity to be heard before final action can be taken.⁷ What the Commission can do to Fetzner it can do to any licensee. As the Fetzner application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzner application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee. *Peoria Broadcasting Co. and Illinois*

same complaint or cause; and (b) for separate hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

And by § 1.194, 47 Code Fed. Reg. Cum. Supp. it is provided:

"The Commission, upon motion, or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing (a) any cases which involve the same applicant or arise from the same complaint or cause, or (b) any applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

⁶ See §§ 301, 304, 307(d), 309(b)(1) of the Act. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 475.

⁷ For the regulations of the Commission governing these procedures see 47 Code Fed. Reg. Cum. Supp. § 1.401 (revocation), § 1.359 and § 1.402 (modification), § 1.411 and § 1.412 (suspension), § 1.360 (renewal).

Broadcasting Co., 1 F. C. C. 167. No suggestion is made here as in *Matheson Radio Co., Inc.*, 8 F. C. C. 427 or *The Evening News Association*, 8 F. C. C. 552, that it may be possible to make workable adjustments so that both applications can be granted. The Commission concedes that "these applications are actually exclusive." The applications are for a facility which can be granted to only one. Since the facility has been granted to Fetzer, the hearing accorded petitioner concerns a license facility no longer available for a grant unless the earlier grant is recalled. A hearing designed as one for an available frequency becomes by the Commission's action in substance one for the revocation or modification of an outstanding license. So it would seem that petitioner would carry as a matter of law the same burden regardless of the precise provisions of the notice of hearing.

It is suggested that the Commission by granting the Fetzer application first concluded that the public interest would be furthered by making Fetzer's service available at the earliest possible date. If so, that conclusion is only an inference from what the Commission did. There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing.

The public, not some private interest, convenience, or necessity governs the issuance of licenses under the Act. But we are not concerned here with the merits.⁸ This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses.⁹ Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

In *Federal Communication Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 476-477, we held that a rival station which would suffer economic injury by the grant of a license to another station had standing to appeal under § 402(b)(2) of the Act. In

⁸ See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145-146.

⁹ Apparently no regulation exists which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date. Nor is there any suggestion that petitioner's application, which was filed shortly after Fetzer's, was not filed in good faith.

Federal Communications Commission v. National Broadcasting Co., 319 U. S. 239, we reached the same conclusion where an application had been granted which would create such interference on the channel given an existing licensee as in effect to modify the earlier license. Petitioner is at least as adversely affected by the action of the Commission in this case as were the protestants in those cases. While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application.¹⁰

Reversed.

Mr. Justice BLACK and Mr. Justice JACKSON took no part in the consideration or decision of this case.

¹⁰ A license to operate a station is required in addition to a permit to construct one. As respects an operating license § 319(b) provides:

"Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."

For the regulations of the Commission governing such applications see 47 Code Fed. Reg. Cum. Supp. § 1.357. It was conceded on oral argument that in that proceeding petitioner would not be entitled to intervene to challenge the propriety of the grant of the construction permit to Fetzer without a hearing on petitioner's application.

SUPREME COURT OF THE UNITED STATES.

No. 65. —OCTOBER TERM, 1945.

Ashbacker Radio Corporation,
Petitioner,
vs.
Federal Communications Com-
mission.

On Writ of Certiorari to
the Court of Appeals for
the District of Columbia.

[December 3, 1945.]

Mr. Justice FRANKFURTER, dissenting.

The extent to which administrative agencies are to be entrusted with the enforcement of federal legislation is for Congress to determine. Insofar as the actions of these agencies come under the scrutiny of judicial review, it is the business of the courts to respect the distribution of authority that Congress makes as between administrative and judicial tribunals. Of course courts must hold the administrative agencies within the confines of their Congressional authority. But in doing so they should not even unwittingly assume that the familiar is the necessary and demand of the administrative process observance of conventional judicial procedures when Congress has made no such exaction. Since these agencies deal largely with the vindication of public interest and not the enforcement of private rights, this Court ought not to imply hampering restrictions, not imposed by Congress, upon the effectiveness of the administrative process. One reason for the expansion of administrative agencies has been the recognition that procedures appropriate for the adjudication of private rights in the courts may be inappropriate for the kind of determinations which administrative agencies are called upon to make.

The disposition of the present case seems to me to disregard these controlling considerations, if the Court now holds, as I understand it so to do, that whenever conflicting applications are made for a radio license the Communications Commission must hear all the applications together.

In the regulation of broadcasting, Congress moved outside the framework of protected property rights. See *Commission v. Sanders Radio Station*, 309 U. S. 470. Congress could have retained

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for itself the granting or denial of the use of the air for broadcasting purposes, and it could have granted individual licenses by individual enactments as in the past it gave river and harbor rights to individuals. Instead of making such a crude use of its Constitutional powers, Congress, by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151, formulated an elaborate licensing scheme and established the Federal Communications Commission as its agency for enforcement. Our task is to give effect to this legislation and to the authority which Congress has seen fit to repose in the Communications Commission.

To come to the immediate issue, what has the Commission done that is here challenged and what authority from Congress does it avouch for what it has done?

The Commission had before it at least two applications for the use of the same radio wave length in the Western Michigan area (Muskegon-Grand Rapids)—that of the petitioner and Fetzner's. The problem before the Commission was the procedure appropriate in acting upon these two applications. Congress has authorized the Commission to grant an application without resort to a public hearing, 47 U. S. C. §§ 309(a), 319(a), but a public hearing may be demanded when the Commission denies an application, 47 U. S. C. § 309(a). The Court in effect rules that in the case of multiple applications the Commission can decide only after a public hearing on all of them. This requirement is apparently derived from the assumption that in this case the Commission, having received two conflicting applications, shut off, out of hand and quite arbitrarily, petitioner's right to have its application considered, as of course the Commission is in duty bound to consider it, by granting Fetzner's. But that is not what happened. The Commission is charged with the ascertainment of the public interest. We must assume that an agency which Congress has trusted discharges its trust. On the record before us it must be accepted that the Commission before having taken action carefully tested, according to its established practice, the claims both of Fetzner and of petitioner by the touchstone of public interest. See Attorney General's Committee on Administrative Procedure, Monograph No. 3, *The Federal Communications Commission* (1940) 8 *et seq.* On the basis of such inquiry, it found that the Fetzner application was clearly in the public interest; it found that the Ashbacker application did not make a sufficient showing

even to stay the Commission's hand in withholding the Fetzter grant long enough to enable Ashbaeker to support its application more persuasively. On the contrary, it thought the public interest would be furthered by making Fetzter's service available at the earliest possible date. There is nothing in the Communications Act that restricts the Commission in translating its duty to further the public interest as it did in the particular situation before it. In granting Fetzter's application and setting the denial of the petitioner's down for a hearing after fully canvassing the situation, the Commission brought itself within the explicit provisions of the Communications Act and applied them with that flexibility of procedure which Congress has put into the Commission's own keeping. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

But it is suggested that the right to a hearing upon denial of an application is not satisfied by a hearing bound to be barren. In order to appreciate the function of a hearing under the statute in a situation like that before us, however, it is vital to remember that the two applications of petitioner's and Fetzter's are very different from an ordinary litigation between Fetzter and petitioner in a court of law. Each of them was before the Commission as the representative of the public interest, the ascertainment of which is the expert function of the Communications Commission. It bears repeating that the application of both presumably received careful scrutiny by the Commission before action was taken. Administrative practice indicates that where there are conflicting applications, the Commission has granted some without hearing where it thought the public interest best served by that procedure, while setting others for hearing where the public interest so demanded.¹ Fetzter made a clear showing to the agency designated for the purpose by Congress that the public interest would be served by the grant of its application. The same agency found no basis in public interest for Ashbaeker's application. Certainly it is wholly conso-

Fiscal Year	Total No. of Applications Considered	Number	Conflicting Applications	
			No. Granted Without Hearing	No. Granted After Hearing
1941	159	49	14	2
1942	142	52	1	2
1943	23	5	0	1
1944	39	14	2	1
1945	114	69	5	8

nant with the scheme of the legislation and the powers given to the Commission that, upon denial of the Ashbacker application after a finding that it would not and Fetzer would serve the public interest, the burden be cast on Ashbacker to show that it would serve the public interest better than would Fetzer. The Commission is authorized by statute to modify a construction permit or any license granted by it.² This gives considerable scope for adjusting the prior grant to Fetzer so as to give to the public the benefits of reconciling both the Fetzer and the Ashbacker applications, if the hearing should develop considerations not disclosed by the prior scrutiny of the Commission. Not only that, but the Commission, in its opinion on hearing the Ashbacher complaint, construed its own action in granting the Fetzer application to be conditional, so as to have room for any action which it may find will serve the public interest after the hearing on the Ashbacker application. Such a practice of conditional grant by the Commission ought not to be deemed outside the range of the procedural discretion allowed to it by Congress.³

In this case, however, the restrictions of the hearing granted to Ashbacker do make of it a mere formality, for the Commission put upon Ashbacker the burden of establishing that the grant of a license to it would not interfere with the simultaneous operations of the proposed Fetzer station. But since the Commission had apparently already concluded that the simultaneous operation of the two stations would result in "intolerable interference," its order for a hearing seems to foreclose the opportunity that should still be open to Ashbacker. It is entitled to show the superiority of its claim over that of Fetzer, even though the Commission, on the basis of its administrative inquiry, was entitled to grant Fetzer the license in the qualified way in which the statute authorized, and the Commission made, the grant. In my view, therefore, the proper disposition of the case is to return it to the

² Sec. 312(b): "Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with" *Cf.* 47 Code Fed. Reg. § 1.402.

³ *Cf.* Berks Broadcasting Company (WEEU), Reading, Pennsylvania, 8 F. C. C. 427; The Evening News Association (WWJ), Detroit, Michigan, 8 F. C. C. 552; Merced Broadcasting Company (KYOS), Merced, California, 9 F. C. C. 118, 120.

Commission with direction that it modify its order so as to assure an appropriate hearing of the Ashbacker application. It may be wise policy to require that the Communications Commission should give a public hearing for all multiple applications before granting any. But to my reading of the Communications Act, Congress has not expressed this policy.

Mr. Justice RUTLEDGE joins in this opinion.